Editor's note: Reconsideration granted; decision re Steven Bergman vacated -- See Steven Bergman, 61 IBLA 399 (Feb. 22, 1982); Reconsideration granted; decision re Elsie Berman vacated -- See Elsie Bergman (On reconsideratom, 64 IBLA 180 (May 26, 1982); Reconsideration granted; decision concerning Walter Titus vacated --See Walter Titus (On Reconsideration), 77 IBLA 321 (Dec. 1, 1983)

ELSIE BERGMAN
WALTER TITUS
STEVEN BERGMAN

IBLA 75-492, 75-494, 75-510 Decided October 22, 1975

Appeal from separate decisions of the Fairbanks District Office, Bureau of Land Management, rejecting in part Native allotment applications F-14260, F-034715, F-14304.

Affirmed.

1. Alaska: Native Allotments

   The requirement of "substantially continuous use and occupancy of the land for a period of five years" applies to all applicants under the Alaska Native Allotment Act, regardless of where the land is situated.

2. Alaska: Native Allotments

   A Native allotment applicant is not entitled to credit for her use and occupancy of the land as a minor child accompanying her parents. Moreover, failure to use the land for at least 8 years prior to applying for a Native allotment precludes an applicant from showing "substantially continuous use and occupancy of the land."

3. Alaska: Native Allotments -- Rules of Practice: Hearings

   Applicants under the Alaska Native Allotment Act do not have a right to a formal hearing before an Administrative Law Judge. However, a hearing may be ordered in the discretion of the Secretary of the Interior.

APPEARANCES: William B. Schendel, Esq., Alaska Legal Services Corp., Fairbanks, for appellants Elsie Bergman and Steven Bergman; E. John Athens, Jr., Esq., Alaska Legal Services Corp., Fairbanks, for appellant Walter Titus.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON

All three appellants filed Native allotment applications with the Fairbanks District Office, Bureau of Land Management, pursuant to the Alaska Native Allotment Act, as amended, 43 U.S.C. §§ 270-1 to 270-3 (1970) (subsequently repealed by 43 U.S.C. § 1617 (Supp. III, 1973)). 1/ Each application was for more than one parcel of land, although none exceeded 160 acres. In separate decisions, the District Office partially rejected each application. Appellants have taken their joint appeal from those decisions.

The District Office rejected in part appellant Elsie Bergman's application for the twofold reason that this appellant had not used or occupied the land since 1962 or 1963 and that prior to that time she was not acting as an independent citizen for herself or as the head of a family. The applications of appellants Walter Titus and Steven Bergman were rejected because neither was able to demonstrate the requisite use and occupancy on the particular parcel of land rejected in each application.

Appellants jointly argue that the requirement that an applicant must show "substantially continuous use and occupancy of the land for a period of five years" applies only to Natives applying for land within a national forest. Appellant Elsie Bergman also argues that rejection of her application for the reason that she only used the land as a minor child is improper. Finally, appellants request that evidentiary hearings be held.

[1] Appellants' joint argument concerning the 5-year requirement is without merit. 43 U.S.C. § 270-1 (1970) gives the Secretary discretionary authority to prescribe rules for the granting of Native allotments. The requirement that all applicants must show "substantially continuous use and occupancy of the land for a period of five years," regardless of where the land is situated, has been a rule since 1935 and is now set forth at 43 CFR 2561.2. Moreover, we do not agree that the legislative history of the 1956 amendments to the Alaska Native Allotment Act, codified as 43 U.S.C. §§ 270-2 and 270-3 (1970), conclusively shows an intent on the part of Congress to limit the 5-year requirement to Natives applying for land within a national forest. Instead, it appears Congress

1/ Appellants and their appropriate case numbers are: Elsie Bergman, F-14260, IBLA 75-492; Walter Titus, F-034715, IBLA 75-494; Steven Bergman, F-14304, IBLA 75-510.

ratified the existing administrative regulations applicable to all Natives. Heldina Eluska, 21 IBLA 292, 293-94 (1975); Warner Bergman, 21 IBLA 173, 175-76 (1975).

[2] The argument of Elsie Bergman that her application was rejected for improper reasons is also without merit. In her application, Mrs. Bergman stated that she has seasonally used the land for hunting, trapping and fishing since 1956, without differentiating between the two parcels she applied for. The field examiner, accompanied by Mrs. Bergman, was unable to find any evidence of recent use and occupancy on the parcel which the District Office later rejected. During the examination, Mrs. Bergman stated to the examiner that she had not used the campsite on the land since 1962 or 1963, at which time she was 18 or 19 years old. The field examiner recommended that her application for this parcel be rejected.

The District Office sent a copy of the field examiner's report to Mrs. Bergman and requested that she submit additional evidence of her use and occupancy of the parcel. She was informed that this evidence must show occupancy for her own use and benefit and not as a minor child in company with her parents. Further, the District Office stated that her occupancy must be at least potentially exclusive of others and not merely intermittent use. Thereafter, Arthur Williams filed an affidavit on Mrs. Bergman's behalf. He stated that she is his adopted daughter, that she trapped on the land with her father from the time she was 5 years old and that she lived there with her family until they moved in 1951, "but still continued using the land until the present even if it was just to berry pick." He also stated that Arthur and Robert Williams used the tract in the winter time to hunt. Mrs. Bergman submitted no other evidence.

The decision of the District Office found that Mrs. Bergman had not shown use and occupancy as an independent citizen for a period of 5 years prior to 1962 or 1963 and that since that time she had abandoned the land. We agree with these findings. Mrs. Bergman began using the land with her father. She does not indicate when, if ever, she began using it alone. An applicant is not entitled to credit for use of land as a minor child accompanying her parents. Lula J. Young, 21 IBLA 207, 208 (1975); Arthur C. Nelson (On Reconsideration), 15 IBLA 76, 78 (1974). Moreover, Mrs. Bergman has not submitted evidence sufficient to call in question the field examiner's finding that the land has not been used recently. Although she states on appeal that she picks berries there, she did not list berry picking as a use of the land in her application nor did she show the field examiner any evidence of such picking. Even if we were to assume that berry picking alone would be acceptable, we do not find credible evidence in the record to substantiate her claim. Failure to use

the land since 1963 prevents Mrs. Bergman from showing "substantially continuous use and occupancy of the land" as required by 43 U.S.C. § 270-3 (1970) and defined by 43 CFR 2561.0-5(a). See William Carlo, Sr., 21 IBLA 181, 183 (1975).

[3] All three appellants request that if their applications are not allowed for the disputed parcels, a "Fair Hearing" be granted. Applicants for Native allotments under 43 U.S.C. § 270-1 (1970) do not have a right to a formal hearing before an Administrative Law Judge. Pence v. Morton, Civil No. A74-138 (D. Alas., April 8, 1975), appeal docketed, No. 2144, 9th Cir., May 23, 1975. However, a hearing may be ordered in the discretion of the Secretary of the Interior. Heldina Eluska, supra at 292; Beulah Moses, 21 IBLA 157 (1975).

As described above, Elsie Bergman has had every opportunity to submit evidence of her use and occupancy. She has alleged no facts nor offered any proof which would be likely to produce a conclusion at a hearing different from that reached by the District Office.

Walter Titus has submitted nothing since the District Office sent him a copy of the field examiner's report and requested additional evidence. In that report, the field examiner stated that during the field examination, Mr. Titus said he had never used this particular parcel but had applied for it because it was a better location than nearby land which he had used. The District Office rejected Mr. Titus' application for this parcel because he had never used and occupied the land. On appeal, Mr. Titus has not presented anything which even suggests that he has used this parcel, much less that would warrant ordering a hearing.

Steven Bergman applied for four parcels of land and stated that he used them for trapping and fishing. Following the field examination, the District Office sent Mr. Bergman a copy of the field examiner's report and notified him that unless he submitted additional evidence, his application for one of the parcels would be rejected. The field examiner had reported that Mr. Bergman, who was present during the examination, was unaware of various trails and markings that the examiner found on the land. He further reported that the only evidence of use pointed out by Mr. Bergman consisted of a blazed tree and a trail. This is in marked contrast to the examiner's report on the other three parcels where Mr. Bergman was able to show various indications of his use and occupancy. The field examiner concluded that although Mr. Bergman may have used the land on occasion, the evidence of use was not sufficient for granting an allotment. In response to the District Office notice, Mr. Bergman executed an affidavit in which he described a firepit and a boat landing on the parcel. He gave no explanation for his failure to show these to the field examiner.

Moreover, in the context of his case, these items do not indicate use which is "at least potentially exclusive of others, and not merely intermittent" as defined by 43 CFR 2561.0-5(a). We find no basis on which to order a hearing.

In each of the cases before us it is unlikely that a hearing would produce a result different from the decisions of the District Office. Therefore, each request for a hearing is denied. Beulah Moses, supra.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are affirmed.

Joan B. Thompson
Administrative Judge

We concur:

Martin Ritvo
Administrative Judge

Anne Poindexter Lewis
Administrative Judge